

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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AMERICAN ZURICH INSURANCE
COMPANY and ZURICH AMERICAN
INSURANCE COMPANY,

Plaintiffs,

vs.

Case No. 20-cv-5026

J. CRISMAN PALMER and GUNDERSON,
PALMER, NELSON & ASHMORE, LLP,

Defendants.

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Deposition via Zoom of: COLIN F. CAMPBELL
Date: December 19, 2022
Time: 2:16 p.m.

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APPEARANCES

Scott R. Hoyt
Pia Hoyt, LLC
Salt Lake City, Utah

Attorney for the Plaintiffs

Jason R. Sutton
Boyce Law Firm, LLP
Sioux Falls, South Dakota

Attorney for the Defendants

REPORTED BY: Audrey M. Barbush, RPR

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1 A I am.

2 Q In what states are you licensed?

3 A I'm licensed in states -- in Arizona and in California.

4 I'm licensed in different federal courts.

5 Q Have you ever appeared in any proceedings in
6 South Dakota pro hac vice?

7 A No.

8 Q Have you ever been licensed in the state of
9 South Dakota?

10 A No.

11 Q Have you ever been to South Dakota?

12 A Yes. I've been through Sioux Falls.

13 Q What brought you to Sioux Falls?

14 A My wife and I have several children, and my wife, on
15 one of our vacations, wanted to bring our girls to the
16 Little House on the Prairie sites, and one of those
17 sites is in South Dakota. I think we drove across
18 South Dakota from Sioux Falls in the east all the way
19 over to Pierre and Rapid City on the west. And I can't
20 remember the particular name of the town, somewhere in
21 the middle of the state we went to, which had the
22 particular Little House on the Prairie site she was
23 interested in.

24 Q Approximately how long ago was that?

25 A Oh, gosh. That would have been between 1990 and 1995.

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1 represent Zurich in claims direct to them over the last
2 couple years?

3 A No, I don't.

4 Q Would you consider Zurich to be a client of the law
5 firm?

6 A No. I could run a conflict check if you would like,
7 but I don't -- to my knowledge -- I mean, if something
8 came across the board on a conflict, I wouldn't think
9 we'd have a conflict. And I don't think we've
10 represented them.

11 Q As part of your experience in private practice, have
12 you appeared as counsel of record defending any bad
13 faith cases?

14 A You have to understand that in most all contract cases,
15 there's an allegation of breach of the duty of good
16 faith and fair dealing, and I have done contract
17 defense cases. So I'm sure there's some allegations of
18 bad faith and fair dealing in contract cases. In terms
19 of insurance bad faith, I can recall suing an insurance
20 company for bad faith and fair dealing. But I do both
21 plaintiff and defense work, and nothing else comes to
22 mind.

23 Q The plaintiffs case which you were referring to, do you
24 recall approximately when that was?

25 A Within the last three years.

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1 Q Do you recall who the insurance carrier was that you
2 were suing?

3 A Yes. I think its initials were USIC. They provide
4 insurance in construction defect cases, and I believe I
5 was representing a contractor on a first-party bad
6 faith claim against USIC.

7 Q Was that actually an action that was filed in court?

8 A Yes. It was a federal action here in the district of
9 Arizona.

10 Q Is that matter still pending?

11 A No. It settled.

12 Q So is that the only case you can recall being counsel
13 of record in which there were allegations of insurance
14 bad faith?

15 A No. I'm just thinking of the more recent past. I had
16 a Damron case, which is a case where an insurance
17 company failed to defend an insured. We got a Damron
18 agreement and then sued the insurance company for a
19 judgment we had obtained.

20 Q Is that essentially an assignment of the bad faith
21 case?

22 A Yes. It's basically an assignment of the bad faith
23 case. They're called Damron agreements in Arizona. I
24 think in other states they're maybe called Mary Carter
25 agreements.

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1 You know, I've been back in practice for 15 years.
2 If I were to go through everything I've done, I'm sure
3 I'd run across some bad faith cases, but nothing comes
4 to mind right now.

5 Q At any time do you recall ever being engaged by an
6 insurance company as defense counsel to defend a bad
7 faith case?

8 A Nothing comes to mind right now. I consult on a
9 variety of cases here in the office, as I'm one of the
10 more senior attorneys. So if there's cases heading to
11 trial, it's not usual for people to consult with me
12 about them.

13 Q Prior to your engagement in this matter, did you know
14 Mr. Hoyt?

15 A I had one other case where I was an expert witness for
16 Zurich. I believe Mr. Hoyt was the attorney on that
17 case.

18 Q What was the nature of that case?

19 A Well, I'm going to have to -- I'd have to go back and
20 review the records. One of my partners, Mr. Mark
21 Harrison, was the expert witness on the case. And then
22 Mr. Harrison passed away, and the representation came
23 to me. And I remember reviewing the case and adopting
24 the same opinions Mr. Harrison had. My recollection
25 is, though, is that the case settled pretty quickly.

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1 Q Do you recall the nature of the legal claims that were
2 at issue in that case?

3 A Not off the top of my head. If you want me to, I can
4 go to my electronic file and see if I can find it.

5 Q Let me ask it this way. Was it a legal malpractice
6 case?

7 A You know, I don't even recall that right now, but I can
8 go into my electronic file and see if I can find it.

9 Q We can maybe do that at a break.

10 Other than your working on that matter previously
11 in which Mr. Hoyt was counsel, do you recall any other
12 experiences you've had with him professionally?

13 A No.

14 Q How about personally?

15 A No. We've only talked on the phone, and I think this
16 is the first time I've seen him face to face, on Zoom.

17 Q So there's this case. You mentioned a previous Zurich
18 matter in which another lawyer in your firm was
19 involved and you adopted his opinions. Are there any
20 other cases in which you've been engaged as an expert
21 witness?

22 A For any person or just for Zurich?

23 Q For any purpose, by anyone.

24 A Yes. You know, given my age and the fact I'm a former
25 judge, I'm retained from time to time as an expert

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1 witness on various issues.

2 Q Do you recall whether your retention in any of those
3 other cases involved allegations of bad faith by an
4 insurance company?

5 A I don't recall that. I've been retained to discuss the
6 reasonableness of attorney fees. I've been retained to
7 testify with respect to the standard of care for
8 lawyers. I think I recall being retained once early on
9 since I came back into private practice on a malicious
10 prosecution case. But various issues.

11 Q Has any court ever excluded any of the opinions that
12 you proffered?

13 A No.

14 Q Have you ever testified live at a trial?

15 A I testified at a bench trial. When you say "live," I
16 assume that includes via Zoom. It was a case that took
17 place during the pandemic, and I testified by Zoom.
18 I've testified at an arbitration hearing. Other than
19 that, I think most of the cases I've had either settled
20 or I submitted affidavits.

21 Q Do you recall being deposed in any of the cases in
22 which you've been involved in which you did not testify
23 at trial?

24 A Yes.

25 Q Let me ask this: Have you ever testified at either a

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1 Q Looking at page 2 of your report, continuing through
2 page 6, there are 79 individual documents that are
3 referenced as having been reviewed.

4 My first question is, do you recall reviewing
5 anything else in forming your opinions other than those
6 items?

7 A There are 79 items listed here. I don't recall
8 reviewing anything else, but I haven't sat down and
9 compared this list with everything I have in this
10 notebook in front of me.

11 Q And in fairness, I'll acknowledge that this list does
12 not include Mr. Hieb's expert disclosure because that
13 was provided after your report. I assume you've
14 reviewed that.

15 A Yes, I have.

16 Q Other than Mr. Hieb's expert disclosure, do you recall
17 reviewing any other documents after you prepared your
18 report in this case?

19 A I just don't recall if anything came in after we did
20 our report. I don't think so.

21 Q The 79 individual documents, or groupings of documents,
22 on pages 2 to 6, have you personally reviewed all of
23 those documents?

24 A I'm pretty sure most of them I have reviewed or
25 skimmed. I put more emphasis on some rather than

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1 Mr. Molinar in finalizing it. Is there any other work
2 that you performed in forming the opinions contained
3 within Exhibit 115?

4 A Well, I've been through the report several times. You
5 know, things take place over time, and if there was --
6 something comes up, I'd need to review the materials to
7 refresh my recollection.

8 I went back through all these materials in
9 preparation for my deposition. If we had meetings
10 where I was going to be talking with the client, I
11 would have gone through materials to refresh my
12 recollection again.

13 So I haven't just looked at them one time, is what
14 I'm suggesting.

15 Q Is there any other work you recall performing in order
16 to form your opinions in this matter?

17 A I don't know what you mean by "any other work."

18 Q You cite some legal resources in your opinion,
19 specifically the Rules of Professional Conduct as well
20 as the Restatement (Third) of Lawyers; is that right?

21 A Correct.

22 Q Is there any legal research that you performed other
23 than the reference to the Rules of Professional Conduct
24 and the Third Restatement of Lawyers?

25 A I don't think in terms of legal research. However, I

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1 have practiced for 45 years, and I have a great deal of
2 experience with respect to a wide variety of cases.
3 So, you know, I bring all of that into the opinions
4 that I form, and work I've done in the past involves
5 research with respect to the conduct of lawyers and
6 what's expected of lawyers. I sat on the State Bar
7 Ethics Committee, the State Bar here in Arizona, in the
8 1980s. I was the chair of that committee. When I was
9 a judge, I believe I also sat on the judicial ethics
10 committee and taught judicial ethics. I have a lot of
11 training and experience in what I believe goes into the
12 concept of the standard of care.

13 Q The Rules of Professional Conduct that you cite in
14 those reports, is that the model rule of professional
15 conduct or is that the South Dakota specifically
16 adopted rule?

17 A I would have to ask Mr. Molinar. I didn't -- he
18 didn't -- I'm not aware of any substantial difference
19 with respect to the standard of care rules he's citing
20 between South Dakota and the rest of the country.

21 Q Did you perform any South Dakota-specific research in
22 forming your opinions in this case?

23 A No, I don't think so. I've certainly read your
24 expert's report.

25 Q Let's turn to page 6 of your report, please.

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1 reasonably, you have to prepare the case, you have to
2 research the case, you have to keep your client
3 informed of the case, all within the context of the
4 particular circumstances of the case.

5 Q Are you considering whether there are any
6 South Dakota-specific aspects of the applicable
7 standard of care in this case?

8 A Well, the circumstances of every case are important,
9 and from what I understand the particular South Dakota
10 aspects, the locality, as your expert refers to it, has
11 to do with this particular lawyer and how he practices.

12 Q Would you agree with me that that's an appropriate
13 consideration in evaluating the standard of care in
14 this case?

15 A Yes, I would.

16 Q Did you speak with any South Dakota lawyers in
17 preparation of your opinions in this matter?

18 A No.

19 Q Now, as I understand it, one of your opinions is that
20 Attorney Palmer fell below the standard of care in
21 failing to plead certain affirmative defenses in this
22 case. Is that true?

23 A I think you misstated it.

24 Q Okay. Correct me.

25 A My opinion -- I'm sorry?